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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 796

WALTER A. MACK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Certificate of Service Appended

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Walter A. Mack, defendant-appellant in the court below, petitions this Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the cause *United States of America, appellee* v. *Walter A. Mack, appellant,* No. 11854, on October 10, 1957, which affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered May 23, 1956.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit, reported at 249 F. 2d 321, is appended hereto as Appendix A. The District Court rendered no opinion in this cause.

JURISDICTIONAL STATEMENT.

On January 12, 1954, and September 3, 1954, the United States Grand Jury for the Northern District of Illinois returned indictments, each in two counts, charging petitioner with four separate violations of 26 U.S.C. (1952) § 145(b), *i.e.*, wilful attempts to evade income taxes for the years 1947 and 1948. (A. 5, 6, 16, 17.)* The indictments were consolidated for trial. (A. 18.) On March 20, 1956, a jury returned its verdict of guilty on one of the four counts submitted to it and reported its inability to agree upon the remaining three counts. (A. 1461 b, 1461 c.) Judgment was entered on the verdict on May 23, 1956, and defendant was sentenced to a year and a day in the penitentiary. (A. 1475.)

The opinion and judgment of the Court of Appeals, affirming the judgment of the District Court, were filed and entered October 10, 1957. (C. A. 1, 2; Appendices A and B hereto.) Rehearing was denied December 23, 1957. (C. A. 3; Appendix C hereto.) On January 11, 1958, Mr. Justice Clark extended the time for filing this petition to and including February 19, 1958. (Appendix D hereto.) This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under the provisions of 28 U.S.C. (1952) § 1254(1).

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* References "A ....." are to the printed appendix to appellant's brief in the Court of Appeals, which has been certified and filed in this Court. References "C. A. ....." are to the certified transcript of proceedings in the Court of Appeals.

QUESTIONS PRESENTED.

1. After 9 continuous hours of deliberation, the jury had failed to reach a verdict. The trial judge then recalled the jury and ascertained that 6 or 8 ballots had been taken but that the jury was not "near any final result." The trial judge then asked the jury, "How many of you believe that you will agree on a verdict or will be able to?" In response to this inquiry 7 or 8 jurors raised their hands. Thereafter the jury was told to resume deliberations "for another hour and try it". Within two hours of this occurrence the jury returned a verdict of guilty on one of the four counts submitted to it. The question is whether the inquiry by the trial judge and the show of hands elicited thereby coerced the jury and deprived petitioner of a free and deliberate verdict?

2. The trial court refused to admit a relevant exhibit identified and offered during petitioner's taking of a deposition of a witness on his death bed. The government did not object to the exhibit until trial, by which time the witness had died. All objections to the contents of the exhibit could have been "obviated or removed" had they been made during the taking of the deposition. Did the trial court, by excluding the exhibit, fail to follow the express provisions of Rule 32(c)(1) and (2) of the Federal Rules of Civil Procedure and was the defendant thereby entrapped and prejudiced?

3. Petitioner was charged with attempted evasion of personal taxes owed for the years 1947 and 1948 and attempted evasion of taxes owed by a corporation, W. A. Mack, Inc., for the same two years. In advance of trial, at the close of the government's case and at the close of all the evidence petitioner moved for separate trials on the personal and corporate counts, pursuant to Rule 14 of

the Federal Rules of Criminal Procedure. The trial court denied the motions. The consolidated trial was lengthy, the issues complex and none of the government's proof was relevant to both charges. Under these circumstances, did the trial court and the Court of Appeals abuse the discretion accorded by Rule 14 of the Federal Rules of Criminal Procedure in refusing to grant defendant separate trials on the personal and corporate charges?

CONSTITUTIONAL PROVISIONS, STATUTE AND RULES INVOLVED.

Amendment VI to the Constitution of the United States is involved in this cause insofar as it provides, "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . ."

Also involved, insofar as it defines the crime with which petitioner was charged, is 26 U.S.C. (1952) § 145(b) which provides in material part, ". . . any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall . . . be guilty of a felony. . . ."

Also involved is Rule 15(d) of the Federal Rules of Criminal Procedure (18 U.S.C. (1952) following § 3771) which provides that in criminal cases, "A deposition shall be taken in the manner provided in civil actions. . . ."

Also involved are the provisions of Rule 32(c)(1) and (2) of the Federal Rules of Civil Procedure (28 U.S.C. (1952) following § 2071) which provide:

> "(c) As to taking of deposition.
>
> "(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground

of the objection is one which might have been obviated or removed if presented at that time.

"(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."

Also involved is Rule 14 of the Federal Rules of Criminal Procedure (18 U.S.C. (1952) following § 3771) which provides:

"If it appears that a defendant is prejudiced by joinder of offenses . . . in an indictment or information or by such joinder for trial together the court may order an election or separate trials of counts . . . or provide whatever other relief justice requires."

A STATEMENT OF THE CASE.

Petitioner is charged, in two indictments, with four separate violations of Section 145(b) of the Internal Revenue Code of 1939. The first indictment charges a wilful attempt to defeat and evade income taxes due and owing by W. A. Mack, Inc., a corporation, for the year 1947, and a wilful attempt to defeat and evade a portion of petitioner's personal income taxes due and owing for the year 1947. (A. 5, 6.) A second two-count indictment, covering the year 1948, contains identical charges, save for the year and the amounts involved. (A. 16, 17.) The two indictments were consolidated for trial. (A. 18.) Petitioner's motions for a severance of the corporate and personal counts was denied. (A. 118.)

Petitioner was tried to a jury which reached a verdict, on one of the four counts submitted to it, at 3:00 a.m., after eleven continuous hours of deliberation, interrupted only by the trial judge's interrogation of the jury, which raised one of the questions presented in this petition. (A. 1461b, 1461c.) The verdict was returned on the corporate count for the year 1947. But, the jury remained in disagreement upon the identical, 1948 corporate count, in support of which the government adduced virtually identical proof, and on the 1947 and 1948 personal counts.

The government charged that petitioner knew that W. A. Mack, Inc. (of which he is president) had received proceeds from sales of new Cadillacs and Oldsmobiles and used cars which were not reflected on its books and records and not reported on its income tax returns and that W. A. Mack, Inc. had claimed deductions for fictitious commission payments. It sought to prove its charges by direct proof. It called numerous customer-witnesses who testified to the prices they had paid for new or used automobiles purchased from W. A. Mack, Inc. The books and records of

the corporation did not properly reflect these prices. However, petitioner's alleged knowledge of these transactions was contradicted by two undenied facts:

First, during all of the years of its existence W. A. Mack, Inc. was audited quarterly by General Motors Corporation auditors. The results of these audits were delivered to and examined by petitioner. They revealed no unrecorded transactions. (A. 172, 173.)

Second, out of some fifty government witnesses who testified to sales transactions with W. A. Mack, Inc. which were productive of alleged unreported income, only two claimed they had conducted those transactions with petitioner. The others testified that they had transacted their business with the corporation's sale manager, Russell O. Bahlenhorst, who died shortly after the first indictment was returned. (See, e.g., A. 298, 309, 317, 366, 388, 389, 390, 394, 402, 461, 493, 495, 528, 540, 575, 601, 695, 752, 810, 843, 848, 866, 881.) It was Bahlenhorst who told certain customers to make their checks payable to persons other than W. A. Mack, Inc. (A. 455, 459, 474); who received cash payments for certain automobiles (A. 392, 398, 483, 676, 844); who instructed one customer to make out two separate checks in payment for one car. (A. 303).

On the other hand, witness after witness, called by the government, testified on cross examination that in those dealings which they had with petitioner personally he had been fair, honest and aboveboard and had adhered strictly to the suggested list prices for new Cadillacs and Oldsmobiles. (A. 570, 591, 607, 753, 758, 785, 789, 792, 865, 869, 872, 874, 883, 888, 899, 904.)

Furthermore, in respect to the alleged improper commission deductions, the proof was clear that Bahlenhorst procured the bookkeeper to draw checks payable to fictitious payees (A. 167, 1154), that Bahlenhorst then took the checks, endorsed them in the names of the fictitious payees, and cashed them at a Chicago bank, where he had made

private arrangements to cash checks made payable to persons other than himself without his endorsement. (A. 1151-1156; 1145.)

The jury retired to deliberate at 4:00 o'clock in the afternoon of the twenty-first day of trial. At 1:10 a.m. the following morning, after nine continuous hours of deliberations, the trial judge recalled the jury to the courtroom. Thereupon the following transpired (A. 1461 *et seq.*):

> "The Court: Without telling the Court how you stand, the Court would like an indication whether there is a prospect of your agreeing on a verdict. How are you progressing?
>
> "Foreman Of The Jury: I suppose I speak for the jury. We are progressing, but we are not near any final result. I will put it that way.
>
> "The Court: Have you taken ballots?
>
> "Foreman Of The Jury: We have taken a number of ballots. I would say we have perhaps taken six or eight, approximately.
>
> "The Court: How many of you believe that you will agree on a verdict or will be able to?
>
> "Foreman Of The Jury: I don't know, I couldn't answer for anybody but myself.
>
> "(Raising of hands by jurors.)
>
> "A Juror: We will agree one way or the other.
>
> "A Juror: Judge, do you think we are taking too much time with this?
>
> "The Court: No, I don't want to hurry you. It is a little after one o'clock. Suppose you go back for another hour and try it.
>
> "Foreman Of The Jury: At the end of the hour, Judge?
>
> "The Court: I don't know. I will make no commitment at this time.
>
> "A Juror: We are sorry to keep you up so late, Judge.

"Foreman Of The Jury: We want to do a good job and give everybody a chance to be heard.

"The Court: All right. Go back and see if you cannot agree on a unanimous verdict."

The jury retired to the jury room and the following colloquy between the court and counsel occurred:

"Mr. Calihan [government counsel]: I would like to make a statement in the record. I don't think there was any indication but that all twelve jurors raised their hands. They indicated that they thought a verdict would be possible. I think all of them had their hands raised. So, at least, there is some encouraging sign.

"The Court: I thought around seven or eight.

"Mr. Levinson [defense counsel]: There was one definitely did not.

"Mr. Calihan: I looked at them. I thought they all did.

"The Court: Some of them raised their hand lightly and put it right down.

"Mr. Crowley [defense counsel]: I think they believe they can reach a unanimous agreement if each agrees with the other.

"The Court: I think we will give them at least another hour and see how they progress."

The jury deliberated for another two hours, until three a.m., at which time it returned its verdict of guilty as to the 1947 corporate charge and reported its continued disagreement as to the identical 1948 charge and the two personal charges.

Following entry of judgment upon the verdict petitioner appealed to the Court of Appeals for the Seventh Circuit assigning as errors, *inter alia*, the questions raised here. The Court of Appeals rejected petitioner's contentions and affirmed the judgment. It is the judgment of the Court of Appeals which petitioner now asks this Court to review by the issuance of its writ of certiorari.

ARGUMENT.

I.

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Each of the questions presented by this petition calls for the exercise by this Court of its supervisory powers in aid of the administration of justice in federal criminal cases. However, the first question is of particular importance because it involves the work-a-day handling of deliberating juries in federal trial courts—both civil and criminal.

Broadly stated, the question is this: Is a trial judge guilty of judicial coercion when, during the course of jury deliberations, he compels the members of the jury to disclose publicly their individual opinions or positions in respect to any aspect of their deliberations?

In the case at bar, the trial judge elicited a show of 7 or 8 jurors' hands in response to his question: "How many of you people believe that you will agree on a verdict or will be able to?"

The Court of Appeals has affirmatively approved this procedure, saying, "To hold [it improper] would be to make it almost utterly impossible for a trial court to make inquiry of the jury as to the progress of their deliberations. It would impede the reasonable and orderly conduct of the trial. . . . We find no error in this inquiry." (249 F. 2d at 324.)

Here, the Court of Appeals disregarded the fact that the trial court had already properly ascertained, by inquiries addressed solely to the foreman, that the jury was "pro-

gressing, but . . . not near any final result", and that 6 or 8 ballots had been taken. (A. 1461, 1461a.) This was all the proper administration of the law required the trial judge to know. (Compare *Burton* v. *United States*, 196 U.S. 283, 308 (1905).) Thus, it was an overstatement for the Court of Appeals to say that disapproval of the procedure here employed will make it "almost utterly impossible for a trial court to make inquiry of the jury as to the progress of their deliberations" and "impede the reasonable and orderly conduct of the trial."

However, the court's unequivocal approval does make certain the regular use of this procedure by federal trial judges across the nation who frequently face the problem of handling a jury having difficulty in arriving at a verdict. Thus, the question is one which vitally affects the administration of justice in the federal courts and, accordingly, deserves this Court's immediate consideration and decision. If the procedure here employed by the trial judge is proper, it warrants this Court's express approval. On the other hand, if, as petitioner believes, the tendency of such a procedure is generally coercive in its effect upon the jury and, therefore, improper, this Court should immediately disapprove it.

II.

The inquiry and response were coercive. In deciding otherwise the Court of Appeals has decided a federal question in a way in conflict with the principles established by an applicable decision of this Court, rendered a decision in conflict with the principles established by decisions of other Courts of Appeals in like matters, and has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its supervisory powers.

The jurors' confidence in the secrecy of their deliberations is a *sine qua non* of the jury system. When that con-

fidence is destroyed, jurors cannot be expected to base their verdict solely upon the proof presented to them. Once they believe, indeed suspect, that their secrecy has been violated, they are exposed, perhaps imperceptibly, perhaps very greatly to the pressures and whims of the community.

To the individual juror, secrecy and anonymity are equivalents. Once a juror is compelled to stand apart from the group and publicly declare his position with respect to any aspect of the deliberations, he loses his anonymity and, insofar as he is concerned, the deliberations have lost their secrecy. As a consequence, his independence may be totally destroyed. No longer will he be concerned only with his own convictions, and those of his fellow jurors, as to the verdict which should be returned. Now he believes that he may be obliged to defend his judgment against the questions and perhaps abuse of outsiders. When these considerations invade the jury room the product is a coerced rather than a free and deliberate verdict.

Recognition of these facts leads directly to the conclusion that the procedure here employed by the trial judge tends to be coercive and is, therefore, improper. *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926.)

Having ascertained that the jurors had balloted 6 or 8 times and were not near a result, the trial judge put the question: "How many of you believe that you will agree on a verdict or will be able to?" Seven or eight jurors, by their show of hands, answered, "We believe that we will agree on a verdict." Conversely, 4 or 5 jurors, by failing to raise their hands, answered, "We do not believe we will agree on a verdict."

By this show of hands the identities of the majority who anticipated a verdict were revealed, as were the identities of the dissident minority. However, the results of the show of hands were not so important as were the possible effects of those results upon the minds of the jurors as they resumed their deliberations. For example:

Those who refrained from raising their hands have been exposed as dissenters. Their judgment cannot help but be affected by this public exposure.

Each juror has been compelled to take an individual, public stand on the prospects of a verdict. How can he know that the next time he is recalled to the court room he will not be asked to take a public stand on the merits?

If any of those who failed to raise their hands is a member of a minority of the jury on the issue of guilt or innocence, he cannot help but feel that he has now identified himself as a member of that minority. In any event, he is already identified as a member of the jury who doubts a verdict will be reached. With the knowledge that he has been so identified, will he dare persist in his dissent until the jury is discharged? Will he risk the public opprobrium which may follow that persistence? (See, *e.g.* the adverse press given the lone dissenting juror in the recent trial of James Hoffa: "One man's Vote," *Newsweek*, Dec. 30, 1957, pp. 20-21; "Hung Jury," *Time*, Dec. 30, 1957, p. 15; "Hoffa Trial Ends in 11-1 Deadlock," *N.Y. Times*, Dec. 20, 1957, pp. 1, 20.)

Of course, these are conjectures. But, as was vigorously emphasized by this Court in *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926), the determination of the psychological impact of a particular incident on any given juror is always within the realm of conjecture.

Suffice it to say, man is most comfortable when he conforms. But, the juror is charged, indeed sworn, to deny himself that comfort, during his deliberations, if, in good conscience, he cannot agree with the views of his fellow jurors. Our law has wisely endowed him with the extraordinary power to cast a single "nay" which must be heard. This role he can best perform if he is permitted to remain anonymous.

Considerations such as the foregoing resulted in this Court's decision in *Brasfield* v. *United States*, 272 U.S. 448 (1926). There the trial court inquired of the foreman, "About how are you divided numerically?" To this the foreman replied, "Nine to three." Mr. Justice Stone, speaking for a unanimous Court, said, in reversing defendants' convictions (272 U.S. at 450):

> "Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. *Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury,* from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge should be excluded. *Such a practice, which is never useful and is generally harmful, is not to be sanctioned.*" (Emphasis added.)

Furthermore, in *Brasfield* the inquiry was put to the foreman and the response given only by him. Even he did not disclose in which group he stood. Thus all of the jurors retained their anonymity. All that was disclosed by the question and answer was that at that point in the deliberations the jury was split.

Compare that situation with the case at bar. The trial court, counsel, the public, the press were advised of the identity of the individuals who did not foresee a verdict. If the procedure employed in the *Brasfield* case was coercive, *a fortiori*, so was the procedure employed in the case at bar.

The several courts of appeals have unequivocally applied the *Brasfield* decision in analogous situations. See, *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506 (C.A. 2); *Spaugh* v. *United States*, 77 F. 2d 720 (C.A. 9); *Berger* v. *United States*, 62 F. 2d 438 (C.A. 10); *Jordan* v. *United States*, 22 F. 2d 966 (C.A. 9); see, also, *Burton* v. *United States*, 196 U.S. 283, 307, 308 (1905).

Thus, in *United States* v. *Samuel Dunkel & Co.*, Judge Clark, speaking for a unanimous court, reviewed the history of this issue of jury coercion. He concluded (175 F. 2d at 510-511):

> "The language of the [Supreme] Court is so clear and sweeping that further questions seem now impossible . . .
>
> ". . . there seems no justification for advancing fine differentiations resting upon the non-use of specific numbers or upon the nomenclature employed in the isolating of that minority. Practically the possibilities of coercion seem the same; legally it would be undesirable further to add to the uncertainties of criminal law administration by such over-refined distinctions. It seems, too, that sustenance cannot be drawn from the jury's long-continued deliberations and apparent care in discriminating between the defendants when it finally rendered its verdict. The very failure of the jury quickly to reach a conclusion has been suggested as an indication of a balance so delicate that any error on the judge's part may turn the scales."

Petitioner submits that, in the case at bar the Court of Appeals has decided a federal question in a way in conflict with the principles established by an applicable decision

of this Court and in conflict with principles established by the decisions of other circuits and has sanctioned such a departure from the usual and accepted course of judicial proceedings at to require this Court to exercise its power of supervision. Accordingly, this Court should issue its writ of certiorari to review the judgment of the Court of Appeals.

III.

Other aspects of the Court of Appeals' decision conflict with controlling provisions of the Federal Rules of Criminal and Civil Procedure. They will vitally affect the administration of justice in the federal courts. Accordingly, they justify the exercise by this Court of its power of supervision.

The issue of jury coercion, because of its obvious importance has been given primary and somewhat detailed attention in this petition. However, two other questions warrant presentation and each would justify the issuance of this Court's writ of certiorari to review the judgment of the Court of Appeals.

1. THE COURT OF APPEALS AND THE DISTRICT COURT FAILED TO FOLLOW EITHER THE SPIRIT OR THE LETTER OF THE EXPRESS PROVISIONS OF RULE 32(c)(1) AND (2) OF THE FEDERAL RULES OF CIVIL PROCEDURE WHICH RELATE TO THE TAKING AND USE OF DEPOSITIONS AND ARE MADE APPLICABLE TO THIS PROCEEDING BY RULE 15(d) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

On January 15, 1954, immediately following the return of the first indictment, defendant's counsel obtained a sworn written statement from Russell O. Bahlenhorst, the sales manager of W. A. Mack, Inc., who was then in the terminal stages of cancer. The statement, which is appended hereto as Appendix E, exonerates defendant from knowledge of or complicity in the transactions

which gave rise to his indictment and conviction. The Court should recall that Bahlenhorst was the sales manager of W. A. Mack, Inc., that virtually all of the government's witnesses testified that they dealt solely with him in their "under-the-table" transactions with the company, and that he died long before this case was tried.

On February 23, 1954, six weeks following the return of the first indictment, defendant obtained leave to take Bahlenhorst's deposition for use pursuant to Rule 15(e) of the Federal Rules of Criminal Procedure (18 U.S.C. (1952) following § 3771), on a showing of his critical condition. The deposition was taken on February 27, 1954, at Bahlenhorst's bedside in his home. He died three days later.

During the taking of Bahlenhorst's deposition, his prior written statement was marked as an exhibit, he identified it as his and then reaffirmed the statements made in it. (A. 1162.) Defendant's counsel then offered the statement in evidence. (A. 1175.) The government did not object. Accordingly, the statement was attached to the deposition and certified by the reporter as a part thereof.

At the trial, Bahlenhorst having died, his deposition was read to the jury. (A. 1148-1175.) In advance of the reading of the deposition, a hearing on objections was had out of the presence of the jury, during which counsel for the government did not object to defendant's offer of the statement in evidence. (A. 1103-1114.) The deposition was then read to the jury. (A. 1148-1175.) The jury heard the interrogation of Bahlenhorst in respect to the statement. The government did not object during the reading of the deposition.

Finally, at the conclusion of the reading, the government objected to the statement for the first time upon the grounds: it had not been offered in evidence at the depo-

sition; there was no effort by the government to cross-examine in respect to it; the government was never given an opportunity to cross examine in respect to it; it had no evidentiary value other than to impeach the witness. (A. 1177-1178.)

The trial court sustained the government's objection and excluded the exhibit because, "Signed statements are only used, are only elicited for impeachment purposes." (A. 1178.) The Court of Appeals affirmed because, "It was not offered for impeachment purposes." (249 F. 2d at 324.)

No question has ever been raised regarding the relevancy of the contents of the statement. By it Bahlenhorst accepted full responsibility for many of the questioned transactions and completely exonerated petitioner of any knowledge of or complicity in them. The statement was clearly admissible as a declaration against his pecuniary interest. Petitioner was grievously prejudiced by the trial court's ruling excluding it.

However, petitioner does not seek review in this Court of a bare ruling on the admissibility of evidence. Rather, this issue warrants this Court's consideration for it concerns the proper and fair application of Rule 32(c)(1) and (2) of the Federal Rules of Civil Procedure which controls the taking of depositions in both civil and criminal cases. (See, Rule 15(d) of the Federal Rules of Criminal Procedure.)

Rule 32(c)(1) and (2) provides that objections to the competency of testimony or the form of the questions put on depositions are waived if the objection is one which might have been "obviated or removed if presented at that time."

In the case at bar, any objection which the government might have made to Bahlenhorst's written statement could have been obviated or removed if it had been made during deposition. Had an objection been interposed when the

statement was offered in evidence during the taking of the deposition, defendant's counsel would have interrogated Bahlenhorst with respect to the contents of the statement, despite his grave illness. Certainly such testimony, if elicited in question and answer form, would have been competent, relevant, material and admissible. However, because of his *then* critical condition (the prosecutor himself said Bahlenhorst was on his "deathbed" [A. 1178]) defendant's counsel properly employed an abbreviated method of interrogation. When, during the trial, the court sustained the government's false, groundless, tardy objection, defendant was outrageously deprived of the highly relevant contents of the statement which were extremely crucial to his defense.

The trial court and the Court of Appeals have, in effect, sanctioned an entrapment which Rule 32(c)(1) is designed to prevent. The inherent fairness of the rule that objections which can be "obviated or removed" must be made at the deposition, has been ignored, indeed tacitly abrogated. This Court should, in the exercise of its supervisory powers, issue its writ of certiorari in order that this very significant rule of federal procedure remain effective.

2. THE TRIAL COURT AND THE COURT OF APPEALS BY HOLDING THAT DEFENDANT WAS NOT ENTITLED TO SEPARATE TRIALS ON THE CORPORATE AND PERSONAL COUNTS ABUSED THE DISCRETION ACCORDED BY THE PROVISIONS OF RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Prior to the trial (A. 118), at the close of government's case (A. 1098), and again at the close of all the evidence (A. 1408), defendant unsuccessfully moved that the government be compelled to elect whether it would proceed upon the corporate or personal counts. The motions were based upon Rule 14 of the Federal Rules of Criminal Procedure which provides,

> "If it appears that a defendant . . . is prejudiced by joinder of offenses . . . the court may order an election or separate trials of counts . . . or provide whatever other relief justice requires." (18 U.S.C. following § 3771.)

The primary consideration in the application of this rule is whether the proof submitted in support of one charge is relevant to the other. The risk is that the jury will consider all of the proof together. *Castellini* v. *United States*, 64 F. 2d 636 (C.A. 6).

In the case at bar the proof in respect to the personal counts was totally irrelevant to the corporate counts, and vice versa. The transactions proved in respect to the corporate counts were totally different from those proved in respect to the personal counts. The government introduced a virtual truckload of duplicative, cumulative exhibits (they totalled more than 1250) and not *one* was relevant to both corporate and personal charges. The jury sat through 21 days of trial and heard 90 witnesses, not one of whom testified to a single fact which was relevant to both charges.

The prosecutor in his presentation of the evidence, and in his summation to the jury, failed to distinguish between the proof submitted on the corporate counts and that adduced in respect to the personal counts. Furthermore, he compounded the confusion in the evidence by repeatedly using defendant's personal name, Walter A. Mack, interchangeably with the corporation's name, W. A. Mack, Inc., despite the fact that defendant's personal tax involvement was *not* the result of any corporate transactions and the *bona fides* of the corporate structure has never been questioned.

Income tax prosecutions are difficult enough to defend against. As a consequence, this Court has recently

warned of the dangers which await a defendant in prosecutions such as this and has admonished federal trial judges to take care that the rights of the defendant are not lost in the government's labyrinth of circumstances. *Holland* v. *United States*, 348 U.S. 124 (1954). Those dangers should not be enhanced by compelling a defendant to defend against separate and distinct tax charges, the proof of neither of which is relevant to the other.

This Court has not taken the occasion to render a decision concerning the application of the severance rule. (Rule 14, Federal Rules of Criminal Procedure.) It is a recurring question in the trial of criminal cases in the federal courts which warrants the Court's consideration. This opportunity should be taken to consider this question and provide the district courts with workable criteria for the application of Rule 14.

CONCLUSION.

Every time a trial judge is confronted with a jury having difficulty in arriving at its verdict, the coercive procedure here employed by the trial judge and sanctioned by the Court of Appeals may be used, unless it is repudiated by this Court. Thus the question of jury coercion presented by this petition is of great importance to the administration of justice in the federal courts.

Certainly, then, this question is one deserving of the exercise by this Court of its supervisory jurisdiction.

Furthermore, each of the other questions presented—the proper application of the Federal Rules of Civil and Criminal Procedure in respect to the taking and use of depositions on the trial, and in respect to the right of a defendant to separate trials on separate, unrelated charges—

is of a recurrent nature. Each was decided by the Court of Appeals at odds with the spirit if not the express provisions of the applicable Federal Rules. This Court should exercise its supervisory powers to prevent this and future departures from the standards of federal judicial proceedings established by the Federal Rules of Civil and Criminal Procedure.

Accordingly, it is respectfully submitted that this case is one which justifies the issuance of this Court's writ of certiorari to the Court of Appeals for the Seventh Circuit to review and reverse the judgment of that court and thereafter remand this cause to the United States District Court for the Northern District of Illinois with instructions that petitioner be granted a new trial.

Respectfully submitted,

ALBERT E. JENNER, JR.,
PRENTICE H. MARSHALL,
135 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioner,
Walter A. Mack.

February 19, 1958.

Certificate of Service

I, Albert E. Jenner, Jr., one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 18, 1958, I served copies of the foregoing petition for Writ of Certiorari on counsel for the respondent, United States of America, by depositing five copies thereof in the United States Mail Box at 135 South LaSalle Street, Chicago 3, Illinois, air mail postage prepaid, addressed to J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C. and five copies thereof, first class postage prepaid, addressed to R. Tieken, Esq., United States Attorney for the Northern District of Illinois, United States Courthouse, Chicago, Illinois.

Albert E. Jenner, Jr.,
One of the attorneys for
Petitioner.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11854 — SEPTEMBER TERM AND SESSION, 1957

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WALTER A. MACK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 10, 1957

BEFORE LINDLEY, HASTINGS and PARKINSON, *Circuit Judges.*

HASTINGS, *Circuit Judge.* This appeal is from a judgment entered upon the verdict of a jury finding appellant guilty of violation of the Internal Revenue Code of 1939, 28 U.S.C.A., Sec. 145(b).

Appellant, Walter A. Mack, was first charged in a two-count indictment. In the first count he was charged with wilful attempt to defeat and evade a large part of the federal income taxes due and owing by W. A. Mack, Inc., a corporation, for the year 1947, by filing in his capacity as president of the corporation, a false and fraudulent income tax return showing taxes due of $70,529.16, whereas it was alleged he knew the net income of the corporation for that year was such that the tax owing to the United States was $94,067.58. The second count charged him with a wilful attempt to defeat and evade a large portion of his personal income taxes for the year 1947.

Subsequently, a second two-count indictment was returned against him covering the year 1948. Its charges were identical to the first indictment save for the year and the amounts involved. Following a lengthy trial in which about ninety witnesses were called and approximately thirteen hundred exhibits were introduced in evidence, appellant was convicted under the first count of the first indictment involving the corporate taxes for the year 1947 above referred to. The jury disagreed on the remaining three counts. Appellant charges the trial court erred in making improper inquiry of the jury during its deliberation, in rulings upon evidence and in prejudicial joinder of the corporate and personal counts for trial.

W. A. Mack, Inc. was engaged in the business of selling new and used automobiles. This appeal involves unreported corporate income of $48,699.59 and fictitious commission deductions of $13,585.00. The unreported income consisted generally of sales of automobiles not recorded in the corporate books and sales where amounts actually received were in excess of amounts recorded. The disallowed deductions were commissions paid to fictitious payees. Appellant admits the evidence is sufficient to sustain the conviction and does not question that in this appeal.

We are called upon to determine four contested issues in each of which appellant vigorously contends the trial court committed reversible error. The record is voluminous and each of these issues necessarily requires a consideration of the pertinent facts. We shall treat them in some detail.

Appellant contends that the trial court made improper inquiry of the jury during its deliberation. The jury retired to deliberate upon its verdict at 4:00 o'clock in the afternoon. At 1:10 the following morning, after continuous deliberation the jury was recalled to the courtroom where the following exchange between the court and the jury took place:

> "The Court: Without telling the Court how you stand, the Court would like an indication whether there is a prospect of your agreeing on a verdict.

How are you progressing?

"Foreman Of The Jury: I suppose I speak for the jury. We are progressing, but we are not near any final result. I will put it that way.

"The Court: Have you taken ballots?

"Foreman Of The Jury: We have taken a number of ballots. I would say we have perhaps taken six or eight, approximately.

"The Court: How many of you believe that you will agree on a verdict or will be able to?

"Foreman Of The Jury: I don't know, I couldn't answer for anybody but myself.

"(Raising of hands by jurors.)

"A Juror: We will agree one way or the other.

"A Juror: Judge, do you think we are taking too much time with this?

"The Court: No, I don't want to hurry you. It is a little after one o'clock. Suppose you go back for another hour and try it.

"Foreman Of The Jury: At the end of the hour, Judge?

"The Court: I don't know. I will make no commitment at this time.

"A Juror: We are sorry to keep you up so late, Judge.

"Foreman Of The Jury: We want to do a good job and give everybody a chance to be heard.

"The Court: All right. Go back and see if you cannot agree on a unanimous verdict."

The jury retired to the jury room whereupon the following colloquy between the court and counsel was had:

"Mr. Calihan: I would like to make a statement in the record. I don't think there was any indication but that all twelve jurors raised their hands. They indicated that they thought a verdict would be possible. I think all of them had their hands raised. So, at least, there is some encouraging sign.

"The Court: I thought around seven or eight.

"Mr. Levinson: There was one definitely did not.

"Mr. Calihan: I looked at them. I thought they all did.

"The Court: Some of them raised their hand lightly and put it right down.

"Mr. Crowley: I think they believe they can reach a unanimous agreement if each agrees with the other.

"The Court: I think we will give them at least another hour and see how they progress."

The jury returned its verdict in open court at 3:10 the same morning.

Appellant's contention that reversible error was committed by the trial court in its inquiry of the jury during its deliberations turns upon a consideration of the language of the court set forth above from the record. It has been definitely and clearly established that an inquiry as to the division of a jury on the question of the guilt or innocence of the defendant is in itself ground for reversal. *Brasfield* v. *United States*, 272 U.S. 448 (1926). In the *Brasfield* case, the jury having failed to agree after some hours of deliberation, the trial judge inquired how it was divided numerically and was informed by the foreman that it stood nine to three without his indicating which number favored a conviction. In reversing the conviction, the court said: "that the *inquiry itself* (our emphasis) should be regarded as ground for reversal" and that "in general its tendency is coercive." In *Burton* v. *United States*, 196 U.S. 283, 307 (1905), the court condemned the practice of inquiring as to the extent of its numerical division. In *United States* v. *Dunkel*, 2 Cir., 173 F. 2d 506 (1949), the inquiry was as to whether or not "there is a majority, a pronounced majority in agreement", with a response from the foreman that "There is a majority, very much." At that point the trial court charged the jury in the often repeated language found in *Allen* v. *United States*, 164 U.S. 492, 501 (1896), upon the duty of the jurors to agree. The court held the inquiry to be improper, and in reviewing the *Brasfield* case found "The language of the Court is so clear and sweeping that

further question seems now impossible." We shall not attempt here to repeat the review of the cases so well considered in the *Dunkel* case. However, the pattern of the inquiry in all of them is as to the numerical division of the jury on the question of guilt or innocence of the defendant without stating how they stood in that regard.

In the instant case, we have an inquiry of a distinctly different character. The inquiry was directed solely to the question of the prospect of the jury agreeing upon a verdict. At no time did the trial court inquire as to a division on the question of the guilt or innocence of the defendant and the jurors offered no response on that subject. In our opinion the rule laid down in the *Brasfield* case does not apply here. To hold otherwise would be to make it almost utterly impossible for a trial court to make inquiry of the jury as to the progress of their deliberations. It would impede the reasonable and orderly conduct of a trial. Here the inquiry was: "Without telling the court how you stand, the court would like an indication whether there is a prospect of your agreeing upon a verdict. How are you progressing?", and, "How many of you believe that you will agree on a verdict or will be able to." This inquiry was one within the bounds of propriety and was not an inquiry as to a division. We find no cases holding that an inquiry as to the prospect of the jury agreeing upon a verdict was improper, prejudicial or coercive. We find no error in this inquiry.

Appellant next contends that the trial court improperly excluded from evidence the affidavit of the witness Bahlenhorst attached to his deposition as an exhibit. Bahlenhorst was sales manager of W. A. Mack, Inc. and had handled a number of the car sales in question and had received the commissions made payable to fictitious payees. He was known to be in ill health and on January 15, 1954, signed an affidavit stating the nature of his employment; the basis of his compensation during the years 1946, 1947, and 1948; his instructions to the bookkeeper during those years to draw commission checks payable to persons other than

himself, these being his monthly commission; his receipt of these commission checks and his cashing them; that the proceeds of these commission checks were never paid to appellant or to the corporation; and that during those years he never turned over any currency to appellant representing over-invoice payments from used car dealers or from customers arising out of sales made by affiant. On February 23, 1954, appellant moved to take the deposition of Bahlenhorst on the ground that he was a material witness and was incurably ill with cancer and not expected to live to testify at the trial. The deposition was taken at his home on February 27, 1954, and he died on March 2, 1954. He was examined at length by counsel for both sides. He identified the affidavit of January 15, 1954, saying that he signed it, that it was executed voluntarily and that the facts recited were true and accurate. The affidavit was attached to the deposition as Exhibit No. 1. The deposition was read in evidence and appellant then offered the Exhibit No. 1 in evidence. The court excluded the affidavit on objection by appellee on the ground that such a signed statement was competent only for impeachment purposes.

Appellant urges the importance of the affidavit as being the only evidence corroborating appellant in his defense that he knew nothing of the various transactions recited therein. However, appellant had ample opportunity to pursue this line of inquiry at the taking of the Bahlenhorst deposition. We cannot speculate as to whether counsel was precluded from asking these questions because of the physical condition of the witness. The inquiry did not seem to be limited otherwise. The affidavit sought to be admitted was an *ex parte* affidavit. It was incompetent and the court properly excluded it for the purposes offered. *Vendetti v. United States*, 9 Cir., 45 F. 2d 543 (1930). It was not offered for impeachment purposes.

Appellant further contends that the trial court improperly admitted appellee's Exhibit 1228, the worksheet of Agents Guest, Clegg, and Bliss, over appellant's objection. This exhibit was introduced by appellee as secondary

evidence of the records of Merrion Motor Sales, which records were not in existence at the time of trial. Exhibit 1228 is a 14-column accountant's worksheet prepared by three revenue agents. It purports to trace the sale of fourteen used automobiles by W. A. Mack, Inc., to Merrion Motor Sales, and from Merrion to the ultimate retail purchasers. Of the fourteen cars listed nine were allegedly sold in 1947 and five in 1948. Agent Bliss testified that he was given the exhibit for use in his investigation in 1951, and that it then bore all the entries appearing in the first nine columns, *viz*: The selling date, the stock number of the new dealer, the make, the body style, the motor number, the serial number, the year of the car, the new car dealer's cost and the new car dealer's selling price, and that these entries were made by Agent Guest.

This information is also substantiated by the original invoices shown in evidence. Bliss further testified that all entries appearing in the 10th, 13th, and 14th columns of the exhibit, being respectively a list of check numbers in those instances where a check was used by Merrion to pay W. A. Mack, Inc., a column marked "additional" showing the names of the retail purchasers of the cars and the used car dealer's selling price, and that these entries were on the exhibit and were made by Agent Clegg. There were also certain entries by Agent Clegg in column 11 and some notations in columns 11 and 12 which were erased by Agent Bliss leaving some of these entries partly legible. Agent Bliss made the entries appearing in column 11 showing the "regular payment" made for the cars, and all of the computations appearing in column 12, these entries being the difference in amount between the entries appearing in columns 9 and 11. The exhibit recited total unreported overpayments for the year 1947 in the amount of $4186.00. Agent Bliss testified that he traced the cars listed on the worksheet through Merrion's books and records consisting of the used car register ("police book"), cancelled checks, check stubs and sales invoices, and that Merrion did not maintain any other records. Merrion testified that these records were kept in the nor-

mal course of his business, and that after the examination of his records by the agents his wife burned the records, and finally that Exhibit 1228 accurately reflected the contents of his records in respect to the purchase price paid by him for the automobiles listed. Merrion had been present at the time Agent Bliss was checking his records. After Exhibit 1228 was in evidence, appellee offered "to blank out all the information except as reflected on the payment of the cars with the motor and serial numbers" prior to handing the exhibit to the jury, to which deletions appellant objected, and the exhibit was admitted as a whole.

Appellant relies strongly on *Hartzog* v. *United States*, 4 Cir., 217 F. 2d 706 (1954), in support of his contention that the document was hearsay due to the failure of all three of the agents who had a part in its original preparation to testify. The *Hartzog* case also involved a conviction for income tax evasion. During the course of that trial, the Government put into evidence two worksheets as a substantial part of its proof of Hartzog's income for the years in question. One set of the worksheets had been prepared by Agent Baynard who died before the case came to trial. The other set was prepared by Agent Berlin who relied heavily on information secured by Baynard. Berlin at no time examined the information and materials upon which Baynard based his figures except on one occasion when he saw Hartzog's farm ledger for about two minutes. The court on appeal correctly decided that the admission of these worksheets over objection of defendant was prejudicial error, stating (at page 708):

> "Clearly the worksheets prepared by Baynard before his death, and introduced *without his testimony*, are hearsay in so far as they tend to indicate the existence of the records and checks upon which the worksheets are based; they are also hearsay as to the amounts and classification of these checks and other records." (Our emphasis).

The court also rejected the contention (at page 710), that Berlin as a supervisor of the project could testify as to the validity of the documents. There was every indication that Baynard had used his own discretion and judgment in the classification of the information that he alone saw.

This case, on its facts, does not support appellant's contention here. Clearly, we do not have a case of an unsworn and unverified version of what an agent thought certain records contained. Agents Guest and Clegg, who preceded Bliss in working on the exhibit in question, did not alone have access to the records which the worksheet purports to reflect. Agent Bliss did not testify as to the work of others of which he had no actual knowledge. On the contrary, Bliss testified that he had transcribed from Merrion's records and books a good part of the figures and information on the exhibit, and that he had verified the work of the other two agents in regard to Merrion's records.

> "It has long been recognized that when a record has been destroyed secondary evidence of its contents may be admitted." *Corbett* v. *United States*, 9 Cir., 238 F. 2d 557, 560, 561 (1956).

This exhibit is the only one of approximately thirteen hundred exhibits in evidence of which appellant now complains. Certainly a substantial portion of the information in the exhibit is substantiated by other exhibits in evidence. It is difficult to conclude that appellant has been prejudiced by the introduction of this exhibit, particularly in view of his objection to the deletion of irrelevant portions thereof. Furthermore, the trial court instructed the jury as follows:

> "The summaries made by witnesses have no independent value as evidence. Such summaries are entitled to weight as evidence only to the same extent that you choose to give weight to the testimony of the witnesses or the books and records upon which the summaries are based. If you choose to disregard as evidence all or a part of the testimony of such witnesses or of the correctness of such books and records

then you must likewise disregard so much of the summaries of the witnesses as are based on the testimony of such witnesses and the books and records you decide to disregard."

We conclude that the trial court did not commit reversible error in the admission in evidence of Exhibit 1228.

Appellant finally maintains that the trial court committed prejudicial error in denying appellant's motions to compel appellee to elect whether it would proceed upon the counts charging attempts to evade corporate taxes or the counts charging attempts to evade personal taxes for the years 1947 and 1948. Appellant's motions were timely and were made pursuant to Rule 14 of the Federal Rules of Criminal Procedure. The court ruled that the trial of all four counts be joined in one action.

Rule 14 provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

The rule itself is addressed to the sound discretion of the trial court. It does not appear to us that appellant was prejudiced or that he was embarrassed in his defense because all four counts were tried together. On the contrary, it would seem that these charges were of the nature that should be joined in trial. In the one instance appellant's personal taxes were involved for the years 1947 and 1948, and in the other instance the corporate taxes for the same years of a corporation of which he was the active head and for which he filed the tax returns in question. We hold that the trial court did not abuse its discretion directing the joinder of the personal and corporate counts in one trial, that the joinder was not prejudicial and that appellant was not thereby deprived of a fair trial.

Appellant insists strongly that this was a "close case" and that, therefore, any claimed error must be closely scrutinized. We shall not hazard a guess on the degree of "closeness" in this case. We do say that all of appellant's claims for reversible error have been carefully considered. The record as a whole discloses to our satisfaction that appellant was fairly tried and that no prejudice was done him in the questioned rulings of the court.

The judgment is

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Before

Hon. WALTER C. LINDLEY, *Circuit Judge*

Hon. JOHN S. HASTINGS, *Circuit Judge*

Hon. W. LYNN PARKINSON, *Circuit Judge*

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WALTER A. MACK, *Defendant-Appellant.* No. 11854	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, December 23, 1957

Before

Hon. WALTER C. LINDLEY, *Circuit Judge*

Hon. JOHN S. HASTINGS, *Circuit Judge*

Hon. W. LYNN PARKINSON, *Circuit Judge*

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11854 v.

WALTER A. MACK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. .....

October Term, 1957

WALTER A. MACK,

Petitioner,

v.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including February 19, 1958.

/s/ Tom S. Clark
Associate Justice of the
Supreme Court of the
United States.

Dated this 11th day of
January, 1958.

APPENDIX E

DEFENDANTS' EXHIBIT 1 FOR IDENTIFICATION AS OF 2-27-25

Affidavit of Russell O. Bahlenhorst offered in evidence by Defendant at page 1175 of the Appendix hereto and excluded from evidence at page 1178 of the Appendix hereto.

"State of Illinois,
County of Cook—ss.

AFFIDAVIT

I, RUSSELL O. BAHLENHORST, being first duly sworn, upon oath depose and say that I was an employee of W. A. Mack, Inc. during the years 1945, 1946, 1947 and 1948.

I further state that sometime in the latter part of 1945 Walter A. Mack and I entered into an agreement whereby we were to share on a commission basis with a drawing account against commissions rather than straight salary. The commissions agreed upon were at the rate of five per cent (5%) of gross sales, each of us to receive two-and-one-half per cent (2½%). This agreement was in effect and was carried out during the years 1946, 1947 and 1948.

I further state that at the end of each month during the time said agreement was in effect, the gross sales and my share of commissions were determined, and I personally wrote my name or the names of various other persons on the sales invoices covering my share of the commissions, as being the person or persons who were the salesmen credited with such sales. Each instance in which I wrote a name other than my own on sales invoices, was unbeknown to Walter A. Mack. I would then direct Miss Margaret Thullen, the bookkeeper for W. A. Mack, Inc., to issue

checks to the various persons whose names were written by me on the sales invoices and to charge the same to the commission account. These checks were in the aggregate amount of my monthly commissions.

I further state that all such commission checks made out to persons whose names I wrote on the sales invoices were, at my direction, issued by Miss Thullen and thereupon delivered to me. None of these checks was in the possession of Walter A. Mack at any time, but they remained in my possession until they were endorsed and cashed by me.

I further state that the proceeds of these commission checks which I received from or caused to be issued by W. A. Mack, Inc. were never in any instance turned over to Walter A. Mack or W. A. Mack, Inc.

I further state that at no time during 1946, 1947 or 1948 did I ever turn over any currency to Walter A. Mack or W. A. Mack, Inc. which allegedly represented over-invoice payments from used car dealers or new or used car customers arising out of sales by me to them of new or used cars.

I further state that sometime during the year 1948 Walter A. Mack informed me that the above-mentioned commission agreement would be terminated on December 31, 1948, and further informed me that I would thereafter be employed on a straight salary basis with a year-end bonus.

The above statement represents a true and accurate recital of the facts according to my present recollection and I do solemnly swear that the statement is true and accurate."

/s/ Russell O. Bahlenhorst

Subscribed and sworn to
before me this 15th day
of January, A. D. 1954.

/s/ Chas. E. Cessna
Notary Public